UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BETTY J. SHOREY, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	)	DOCKET NUMBER DA-0752-96-0019-I-1 DATE: JAN 6, 1998

Betty J. Shorey, San Antonio, Texas, pro se.

Michael D. Waldrop, Esquire, Fort Sam Houston, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

OPINION AND ORDER

The agency has petitioned for review of an initial decision that mitigated the appellant's removal to a 60-day suspension, and the appellant has cross-petitioned. For the reasons set forth below, we GRANT the agency's petition, REVERSE the initial decision in part, SUSTAIN the removal penalty, and DENY the appellant's cross-petition for review.

BACKGROUND

The procedural history in this case begins on October 3, 1995, when the appellant filed a timely appeal of the agency action removing her from her position as a GS-9 Budget Analyst on the following charges: (1) Unsatisfactory performance; (2) insubordination; and (3) using offensive, discourteous language toward her supervisor. *See* Initial Appeal File (IAF), Vol. 4, Tab 20 (henceforth the "initial decision" or "ID"). In an initial decision issued on January 26, 1996, the administrative judge ordered the agency to cancel the removal, and to substitute a 60-day suspension.

After the agency filed a petition for review, the parties reached a settlement, and the agency withdrew its petition. *See* Petition for Review File (PFRF), Tab 5. Accordingly, the Board reopened the appeal under 5 C.F.R. § 1201.118, vacated the initial decision, and dismissed the appeal as settled. *See* PFRF, Tab 6.

The administrative judge subsequently granted the appellant's second petition for enforcement, *see Shorey v. Department of the Army*, MSPB Docket No. DA-0752-96-0019-C-2 (Compliance II File), Tab 1, recommending that the Board rescind the settlement agreement and reinstate the initial decision, along with the agency's petition for review. *See* Compliance File, Tab 1. The Board adopted the recommendation. *See Shorey v. Department of the Army*, MSPB Docket No. DA-0752-96-0019-X-1 (Compliance Referral File or "CRF"), Tabs 4, 5.

In the now-reinstated initial decision, the administrative judge had sustained all three specifications of the first charge, which alleged the appellant's failure to meet the standards of her critical performance element three: Prepares/Analyzes Reports. *See* ID at 3, 5-7 and IAF, Vol. 2, Tab 6, Subtab 4C. However, she found that the standards given to the appellant covering critical element three did not establish a "benchmark" against which the appellant could

assess whether her performance was acceptable. *See* ID at 8 and IAF, Vol. 2, Tab 6, Subtab 4K, the agency's Senior System Civilian Evaluation Report Support Form (the Form). Therefore, the administrative judge did not sustain the agency's first charge. *Id.* at 9.

She found that the agency proved its second and third charges by preponderant evidence, and she sustained them. ID at 9-13. She further found that the appellant did not establish that the agency discriminated against her on the basis of sex and/or national origin, disability, or reprisal for her previous EEO activity. *See id.* at 13-14, 15-17, and 17-19, respectively.

Because the charge of unsatisfactory performance was not sustained, and in light of what she found to be mitigating factors involving the second and third charges, the administrative judge mitigated the penalty to a 60-day suspension. ID at 21.

The documents at issue here are thus the January 1996 initial decision, the agency's petition for review of March 6, 1996, and the appellant's cross-petition for review.[1] The agency has submitted evidence of interim relief sufficient to satisfy 5 C.F.R. § 1201.115(b). *See* PFRF, Tab 8. The appellant, however, has challenged the agency's interim relief undue disruption determination and asks for immediate reinstatement. *See* CRF, Tab 6.

ANALYSIS

We find, at the outset, that the appellant's challenge to the agency's undue disruption determination is beyond the scope of our review authority. *See King v. Jerome,* 42 F.3d 1371, 1374-75 (Fed. Cir. 1994) (the Board has no authority to

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[1] The appellant styles her submission a "response," but her request to have the 60-day suspension removed from her records, and her reassertion of her claim that the agency's action was retaliatory, together convert it into a "cross-petition." *See Levy v. Office of Personnel Management,* 41 M.S.P.R. 139, 140 n.1 (1989) (a

review whether an agency's decision to detail or reassign an appellant was made in good faith; the Board's authority is restricted to deciding whether an undue disruption determination was made when required, and whether the appellant is receiving appropriate pay and benefits). Thus, the appellant's request for immediate reinstatement on this ground is without merit.

We therefore turn to the agency's petition for review, in which it requests that the removal penalty be sustained, because it communicated to the appellant the level of performance necessary for her to receive an acceptable rating. We agree.

The three specifications under the first charge are as follows: (1) Failure to accurately prepare the Executive Budget Summary for January 5, 1995; (2) failure to analyze adverse trends and to manage Operations Maintenance Army Reserve (OMAR) accounts; and (3) failure to post commitments to the Army Community of Excellence (ACOE) accounts. *See* IAF, Vol. 2, Tab 6, Subtab 4C. Although, as noted, the administrative judge sustained each of the specifications individually, she did not sustain the charge of unsatisfactory performance because, she found, the agency failed to establish that the appellant's performance was evaluated "pursuant to valid standards." *See* ID at 7-8. The administrative judge then proceeded to cite a series of cases finding performance standards to be necessary, citing, *inter alia, Wilson v. Department of Health and Human Services*, 770 F.2d 1048, 1052 (Fed. Cir. 1985). *See* ID at 8. We note that all the cases the administrative judge cites in support of her conclusion concern actions effected under 5 U.S.C. chapter 43.

Our reviewing court, the United States Court of Appeals for the Federal Circuit, has allowed the continued use of chapter 75 to effect actions that are entirely or partially performance-based. *See Lovshin v. Department of the Navy*,

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response merely addresses the points raised in the agency's petition for review), *rev'd on other grounds*, 902 F.2d 1550 (Fed. Cir. 1990).

767 F.2d 826, 843 (Fed. Cir. 1985) (en banc) (an agency may rely on either chapter 75 or chapter 43 to take a performance-based action). The agency's SF-50 states that the action taken was a removal under chapter 75. *See* IAF, Tab 6, Subtab 4B. In addition, the administrative judge found that the agency removed the appellant pursuant to the provisions of chapter 75, *see* ID at 2, and neither party, upon petition for review, has challenged her finding. The Board has held that an agency may not process an action under chapter 43 and then change the theory of its case to chapter 75 after hearing, by which point it has determined that it has not complied with all chapter 43 requirements. *See Ortiz v. U.S. Marine Corps*, 37 M.S.P.R. 359, 363 (1988). However, that is not what occurred here. We find that the action in this matter was taken, and was legitimately taken, under chapter 75.

We further find that the administrative judge has erred in applying chapter 43 standards to a chapter 75 case. It is well established that a specific standard of performance need not be established and identified in advance for the appellant in a performance action brought under chapter 75; rather, when an agency takes such an action under that chapter, it must simply prove that its measurement of the appellant's performance was both accurate and reasonable. *See Moore v. Department of the Army*, 59 M.S.P.R. 261, 265 (1993), *appeal dismissed*, 16 F.3d 422 (Fed. Cir. 1993) (Table).

An agency may not, though, circumvent chapter 43 by charging that an employee should have performed better than the standards communicated to her in accordance with chapter 43. *See Lovshin*, 767 F.2d at 842. The record here reflects no indication of surprise or circumvention; nor does the appellant make any such claim. The administrative judge herself has usefully summarized the parties' stipulations, which set forth the specific requirements conveyed to the

appellant, and the agency's numerous discussions of those requirements with her,[2] including memoranda of deficient performance, followed by a 90-day performance improvement plan (PIP), with a 60-day extension. *See* ID at 3-4. Based on the record evidence, the administrative judge's own findings, and the state of chapter 75 case law regarding performance-based actions, we find that the agency proved that its measurement of the appellant's performance was both accurate and reasonable. *See Moore*, 59 M.S.P.R. at 265. Accordingly, the first charge, too, is sustained.

An agency's penalty determination is based on the charged misconduct. *See Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650 (1996). When all of the charges are sustained, the penalty determination made by the agency is a reliable standard to review. *Id.* That determination is entitled to deference, and should be reviewed only to determine whether the agency responsibly balanced the relevant factors in the individual case. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). Since the record reflects that the agency considered all factors pertinent to the three charges, *see* IAF, Tab 12, we defer to the agency's penalty as being within the "tolerable limits of reasonableness," given the clear relationship of all charges and the appellant's work place responsibilities. *See Douglas*, 5 M.S.P.R. at 306. Accordingly, we sustain the penalty of removal.

In her response to the agency's petition, the appellant reiterates her contention that the agency discriminated against her in reprisal for her previous EEO activity. *See* PFRF, Tab 7 at 1. We find that this argument, which constitutes mere disagreement with the administrative judge's explained findings, does not warrant full review of the record by the Board. *See Jefferson v. U.S. Postal Service*, 73 M.S.P.R. 376, 380 (1997).

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[2] The pertinent stipulations appear at IAF, Tab 17, paragraphs 4, 5, and 8-13.

The appellant also contends that the agency failed to comply with various sections of the settlement agreement -- an argument which is moot at this state of the proceedings, since the settlement agreement has been rescinded, at her request. Pursuant to the same Board Opinion and Order which rescinded the settlement and reopened the appeal on the merits, the appellant requests her "right to sue" letters for "each EEO complaint." *See* PFRF, Tab 7 at 3. To the extent that any EEO issues are raised here, the appellant's further review rights as to this case are set forth below.

Finally, the appellant requests that the 60-day suspension be removed from her record. We deny the request as moot.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.